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Before the
Federal Communications Commission
Washington, DC

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of FM EXAMINERS)

SHELLEE F. DAVIS)

File No. BPH-911231MA

For Construction Permit for)
New FM Broadcast Station on)
Channel 280A, Westerville, Ohio)

To: Chief, Audio Services Division
Mass Media Bureau

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AUDIO SERVICES
DIVISION

transmitter site would only be deemed "short-spaced" (under a
Section 73.207 analysis) by virtue of the application of the new
spacing rules However as established in previous pleadings.

The Commission specifically grandfathered vacant "allotments" as well as "stations" when adopting its new Rules.

Cf. Supplement at 2. Section 73.213 specifically states:

New stations on channel allotments made by order granting petitions to amend the Table of Allotments which were filed prior to October 2, 1989 may be authorized in accordance with paragraphs (c)(1) or (c)(2) of this section.

47 C.F.R. § 73.213(c). Similarly, in the Report and Order, the Commission stated:

the rules we are adopting become effective on October 2, 1989. Applications and petitions filed prior to October 2, 1989...will be processed in accordance with, the current [old] rules.

Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3), 4 FCC Rcd 6375, 6382 ¶ 57 (1989).

Pursuant to that Section and that language, many "short-spaced allotments" have been properly created, and "short-spaced" applications were declared to be acceptable for the allotments, under the provisions of Section 73.213(c)(1). See, e.g., Boalsburg, Clearfield, PA, et al., 6 FCC Rcd 4296, 4302 n.17

policy regarding applications for construction permits filed to implement allotments resulting from petitions for rule making to amend the Table of Allotments filed prior to October 2, 1989 (the effective date of the new Class A spacing requirements). Such applications must meet the new spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment.

Amendment of Part 73 of the Rules to Provide for an Additional FM



(Chief, Allocations Branch 1991); Vergennes, VT; Hague and Westport, NY, 6 FCC Rcd 3364, 3365 n.9 (Chief, Allocations Branch 1991); Randolf and Brandon, VT, 6 FCC Rcd 1760, 1764 n.13 (Chief, Allocations Branch 1991); Patterson, CA, 7 FCC Rcd 1719, 1721 n.14 (Ass't Chief, Allocations Branch 1992); Northwye, Cuba, Waynesville, Lake Ozark, and Eldon, MO, 7 FCC Rcd 1449, 1453 n.15 (Chief, Allocations Branch 1991); LaFayette, GA, 6 FCC Rcd 7427, 7428 n.5 (Ass't Chief, Allocations Branch 1991); New Albany, NY, 6 FCC Rcd 5139 n.5 (Ass't Chief, Allocations Branch 1991); Belvedere, NJ; Scranton and Tannersville, PA, 6 FCC Rcd 1333, 1336 n.7 (Chief, Allocations Branch 1991); Bourban and Columbia, MO, 6 FCC Rcd 250.

language of Section 73.213(c), which specifically states that it applies to "allotments" as well as "stations."

It is well accepted that the Commission will not allot technically deficient allotments, i.e., short-spaced allotments or allotments that will not provide full city-grade service. San Clemente, CA, 3 FCC Rcd 6728 ¶ 6 (1988); Greenwood, Seneca, Aiken, and Clemson, SC, and Biltmore Forest, NC, 2 FCC Rcd 3583, 3586-87 (Chief, Policy and Rules Div. 1987) (denying an allotment that would not provide full city-grade service); Chester and Wedgefield, SC, 4 FCC Rcd 4503 (Chief, Policy and Rules Div. 1989) (denying a request to create a short-spaced upgraded allotment); Milligton, MD, 45 R.R.2d 1689 (Broadcast Bureau 1979) (declining to waive minimum separation requirements).⁴ The sole exception to this stringent policy involve those situations referenced above, where an allotment is being added pursuant to a petition for rule making filed before the effective date of the new 6 kW rules, and the allotment satisfied at least the old (3 kW) spacing rules. 47 C.F.R. § 73.213(c). The same policies are applicable to petitions to delete vacant allotments.

Putting aside the fact that Saloy dealt was a case concerning an application filed for an already-deleted allotment, Saloy dealt with the unique situation where the allotment became vacant and the allotment was "short-spaced" under what is now the

⁴ This even is true since the adoption of Section 73.215 of the Rules, allowing for "short-spacing" in cases where a proponent proposes to directionalize the use of an allotment. FM Broadcast Stations (Short-Spacing Using Contour Protection), 69 R.R.2d 1106, 1110 ¶ 13 (1991).



addressed, however, was the version of the rule that existed in early 1989, and which predominantly is now contained in Section 73.213(a) of the current Rules. In its recent Memorandum Opinion and Order in the Solov case, the Commission correctly determined that Section 73.213 (really, Section 73.213(a)) can not operate to justify the retention of an allotment on the Table of Allotments that is deficient because it is short-spaced under all spacing rules. Solov, FCC 92-565 ¶ 17.⁷ Here, in contrast, the Westerville allotment continues to satisfy the requirements of the old spacing rules (and therefore its continued existence is justified), and under the provisions of Section 73.213(c) (which, as seen above, specifically is applicable to allotments as well as stations), applications may be filed at locations utilizing the old spacing protections and radiation limitations in the direction of the "short-spaced" station. As the Commission repeatedly has made clear, "short-spaced" applications on non-short-spaced channels are acceptable in the appropriate circumstances. Therefore, ORA's arguments again are specious.

In short, ORA is improperly attempting (1) to invoke in the application process an analysis and policy used to review whether to make or delete an allotment; and (2) is utilizing a decision involving what is now essentially Section 73.213(a) of the Rules and is attempting to make the decision applicable also to Section 73.213(c). Both attempts are improper attempts to wrongly

⁷ For this reason, a Hudson, Michigan applicant would not be able to apply for the Hudson allotment and satisfy the requirements of Section 73.213(c)(1) of the Rules.

interpret the Commission's Rules and to wrongly manipulate the language of a Commission decision, and should be rejected.

WHEREFORE, it is respectfully requested that the "Supplement to Petition to Deny and Dismiss the Application of Shellee F. Davis," filed by Ohio Radio Associates ("ORA") be denied.

Respectfully submitted,

SHELLEE F. DAVIS

By: 

Dan J. Alpert

Her Attorney

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February 12, 1993

ATTACHMENT 1

DISCUSSION

This firm has been retained by John M. Salov to prepare the required engineering report in support of an application for a new FM Broadcast station, serving the area of Hudson, Michigan.


FM Channel 249(A), 97.7 MHz, is listed for use at Hudson, and this application proposes the use of that channel. The data contained in this report is responsive to the rules of the Commission, and provides the data for FCC Form 301, Sec.V-B.

A transmitter site has been secured, for the purpose of this application, at a location that provides compliance with 47 C.F.R. 73.315(a) and (b).

The FAA has been notified of the proposed tower construction, and Form 7460-1 has been filed with that agency, as required.

It is proposed to operate the transmitter by remote control, from a studio location within the corporate limits of Hudson, Michigan. The exact studio location will be determined following the grant of this application.

The transmitter site proposed in this application does not fully



RADIATION PROTECTION: This proposal has been evaluated for compliance with FCC guidelines concerning human exposure to radiofrequency radiation. The standards employed are detailed in OST Bulletin No.65, October 1985.

Table 1 of Appendix B was employed for this study concerning FM broadcast radiation protection.

For the effective radiated power and type of antenna proposed, the minimum antenna radiation center above ground is specified as 13.6 meters.

This application proposes an antenna height above ground of at least 98 meters. Therefore, full compliance with the guidelines is attained by the instant application.

In addition to the protection afforded by the proposed antenna height above ground, the facility will be properly marked with signs, and entry to the facility will be restricted by means of locked fencing.

Any other means as may be required to protect employees and the general public will be employed.

TABULATION OF PROPOSED SERVICE ON CHANNEL 249A

Hudson, Michigan

Frequency: 97.7000 MHz

Antenna elevation (AMSL): 395 Meters

AZIMUTH	AVERAGE ELEVATION 2 TO 10 MILES	ANTENNA HEIGHT ABOVE AVERAGE TERRAIN	DEPRESSION ANGLE TO RADIO HORIZON	EFFECTIVE RADIATED POWER	DISTANCES TO CONTOURS		
					CITY GRADE (70 dBu)	URBAN (60 dBu)	RURAL (55 dBu)
N .0 E	319 M	76 M	.24 Degs	4.80 dBk	11.9 km	21.3 km	.0 km
45.0	311	84	.25	4.80	12.6	22.4	.0
90.0	271	124	.31	4.80	15.2	26.9	.0
135.0	263	132	.32	4.80	15.7	27.6	.0
180.0	267	128	.31	4.80	15.4	27.3	.0
225.0	278	117	.30	4.80	14.8	26.2	.0
270.0	325	70	.23	4.80	11.4	20.4	.0
315.0	327	68	.23	4.80	11.3	20.1	.0

Average
of 8
Standard
Radials

295 M 100 M

TABULATION OF SPACINGS FOR CHANNEL 249A

 FM SEARCH RESULTS FOR: NORTHLANDS COMMUNICATIONS - HUDSON, MICHIGAN N 41-53-06 W 84-18-57 CHANNEL # 249A

CALL	LOCATION	STATE	CHANNEL	STATUS	N. LATITUDE	W. LONGITUDE	SEPARATION			RESULT:
							AZ	IN	KM	
							DEG.	ACT	REQ	
WJIM	GOSHEN	IN	249A	LIC	41 36 4	85 55 41	257.3	138.0	105	CLEAR 33.0 KM
WJLB	DETROIT	MI	250B	LIC	42 24 22	83 6 44	59.3	115.0	105	CLEAR 10.0 KM
WGRO-FM	GRAND RAPIDS	MI	250B	LIC	42 47 46	85 38 58	313.2	149.0	105	CLEAR 44.0 KM
ALLO	HUDSON	MI	249A		41 49 0	84 14 30	141.0	10.0	105	*SHORT* 95.0 KM
WJIM-FM	LANSING	MI	248B	LIC	42 44 22	84 30 49	350.4	96.0	105	? ? ? 9.0 KM
WJIM-FM	LANSING	MI	248B	CP	42 44 23	84 30 43	350.4	96.0	105	? ? ? 9.0 KM
WEJY	MONROE	MI	248B	LIC	41 55 7	83 26 12	86.8	73.0	0	FYI
WTHR	MONROE	MI	252A	LIC	41 50 43	83 27 59	93.3	71.0	27	CLEAR 44.0 KM
WGSN	CASTALIA	OH	249A	LIC	41 23 48	82 47 31	112.7	138.0	105	CLEAR 33.0 KM
WDFM	DEFIANCE	OH	251B	LIC	41 17 28	84 32 17	195.7	69.0	69	0.0 KM
WTGN	LIMA	OH	249A	LIC	40 45 26	84 8 12	173.1	126.0	105	CLEAR 21.0 KM
880B1635	JAK HARBOR	OH	247A	APP	41 32 25	83 15 52	113.4	96.0	27	CLEAR 69.0 KM
ALLO	SANDUSKY	OH	249A		41 26 54	82 42 24	109.4	143.0	105	CLEAR 39.0 KM
ALLO	TOLEDO	OH	252A		41 38 48	83 32 30	112.2	70.0	27	CLEAR 43.0 KM

As this tabulation shows, the transmitter site proposed in this application is short spaced to the transmitter site of WJIM-FM, Ch. 248B, Lansing, Michigan. Other required spacings are met at this site.

REQUEST FOR WAIVER:

A request for a waiver of the short spacing to WJIM-FM is hereby tendered. The map exhibit which follows in this report shows that no "open area" exists for the use of Channel 249A at Hudson, Michigan, where a transmitter site may be properly spaced, and still provide the community with 3.16 mV/m (70 dBu) service, as required by 73.315 of the rules.

The limits of the open area are formed by the spacing arcs from WJIM-FM, Channel 248B, Lansing, Michigan, WJLB, Channel 250B, Detroit, Michigan, and WDFM, Channel 251B, Defiance, Ohio.

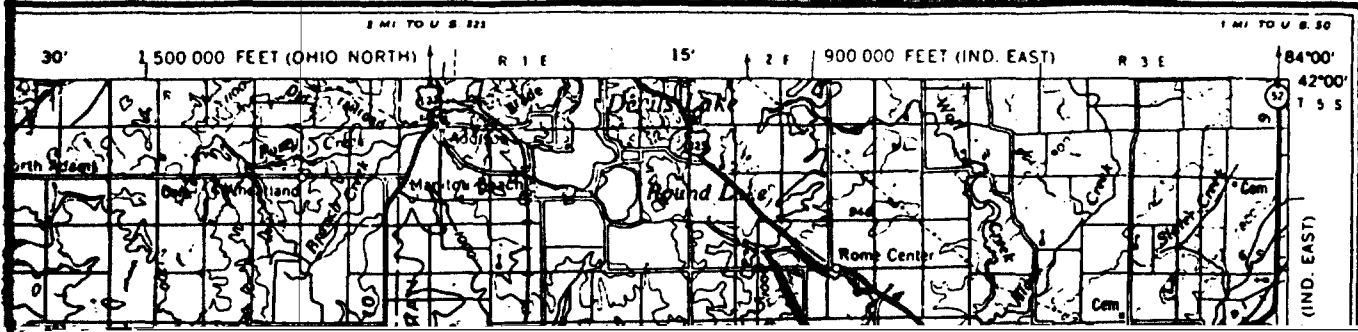
The designated reference point for the use of Channel 249A at Hudson, Michigan, meets the spacing from WJIM-FM, but is short spaced to WDFM, Defiance, Ohio. The spacing from the listed reference point to WDFM is 63.39 km. The spacing from that reference point to WJIM-FM is 104.92 km.

As the map exhibit shows, a full facility Class A station, located at the extreme western point of the properly spaced open area would not reach the easternmost limit of Hudson, Michigan. The contour would fall about 2.4 km short of the east limits. Thus, a properly spaced site cannot comply with 73.315(a).

A choice has been made therefore to provide compliance with

47 C.F.R.73.207 SHOWING

NK 16-9 -5-



ATTACHMENT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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SEP 18 1989

FCC MAIL BRANCH

In re Application of)

JOHN M. SALOV)

File No. BPH-890118MD

For A Construction Permit For)
A New FM Broadcast Station At)
Hudson, Michigan,)

and)

Window Notice For The Filing)
of FM Broadcast Applications)
CF-12A, Hudson, Michigan)

SEP 18 1989

TO: The Full Commission

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's Rules and Regulations, John M. Salov ("Salov"), by his attorney, hereby respectfully requests the Full Commission to review and set aside the action of the Chief, Audio Services Division, taken by letter dated August 31, 1989, denying Salov's "Petition for Reconsideration and For Acceptance of Application", filed in this proceeding on January 18, 1989. In support thereof, it is alleged:

I. Petitioner and His Interests In This Proceeding.

1. By Window Notice CF-12, released December 13, 1988, the Commission invited the filing of applications for a

construction permit for a new FM broadcast station to operate on
Channel 249A at Hudson, Michigan. The Commission further announced

filing deadline; and amend the application as soon as possible to eliminate any interference to other stations.¹

4. The application was complete and was ready for filing on January 16, 1989, one day before the deadline. On that day, however, Mr. Salov's consultant received a copy of a window notice, issued by the Commission on January 13, 1989, one business day prior to the January 18, 1989, filing deadline.² A copy of that notice is attached and marked Exhibit C. It purported to delete Hudson, Michigan, from the public announcement made on December 13, 1988, stating that there are "technical difficulties with this channel".

5. On January 18, 1989, Salov tendered his application for a construction permit for a new FM broadcast station at Hudson, Michigan. Salov accompanied the application with a "Petition for Reconsideration and For Acceptance of Application". On August 31, 1989, however, the Chief, Audio Services Division issued a letter opinion, a copy of which is attached and marked Exhibit D, purporting to deny Salov's petition. Salov appeals from the decision of the Chief, Audio Services Division.

¹ An application may be filed on a short spaced basis, provided that it is timely amended to eliminate the short spacing and/or otherwise comply with the applicable rules. Midcom Corp., 39 Pike and Fischer RR 2d 943 (1977).

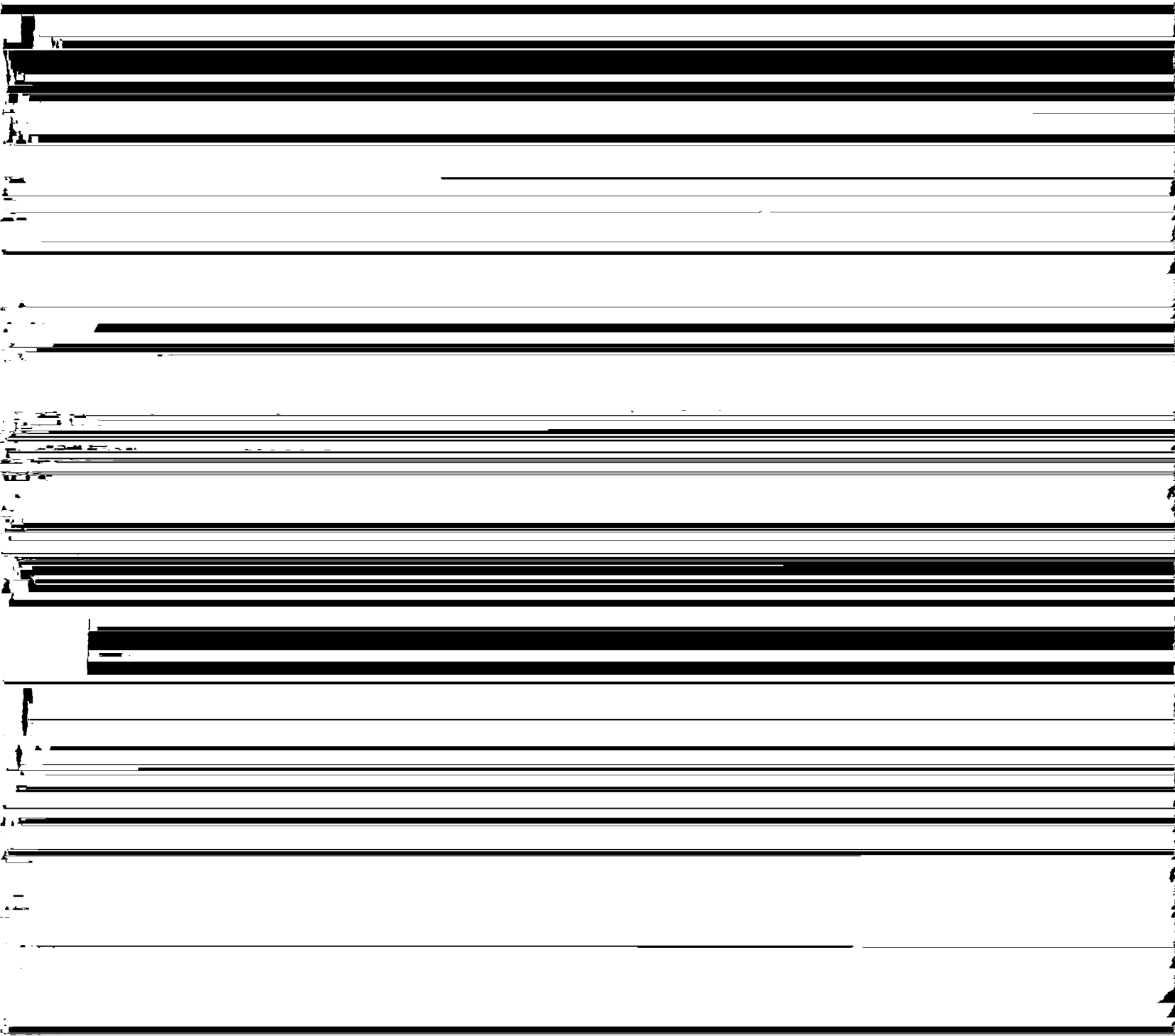
² The 14th, 15th, and 16th of January were all government holidays. Consequently, the only business day following January 13 and prior to the filing deadline was January 17, 1989.

**II. The Decision of the Chief, Audio Services Division,
Like the Action of the Mass Media Bureau,
Was Arbitrary and Capricious, and Must Be Reversed.**

6. It is well-settled that an agency is bound by its own rules, and the public dealing with the agency is entitled to rely upon those rules Service V. Dulles, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957). Here, Section 73.3564(d)(3) of the Commission's Rules and Regulations provides for the issuance of "window notices" inviting the public to file applications for construction permits for new FM broadcast stations. Here, acting pursuant to its rules, the Commission issued a proper "Window Notice" (CF-12), inviting applications for construction permits for a new FM broadcast station to operate on Channel 249A at Hudson, Michigan. Salov was entitled to rely upon that notice. Indeed, Salov did rely upon the notice and expended large amounts of money, time and effort in reliance thereon.

7. Of course, there may be cases in which a "window notice" might be issued by mistake. Thus, it could happen that, through some error, the Commission might put out an invitation for the filing of applications which might result in an intolerable short-spacing to some existing station. In such cases, the Commission could certainly take action to rectify its mistake. That is not the situation here, however. In this instance, there is nothing to indicate that Window Notice CF-12 was issued by mistake.

8. To the contrary, by the time that the notice was issued, the Commission had already adopted rules permitting applicants to use directional antennas, so as to protect existing stations from electrical interference, resulting from minor "short-spacings"³. The rules had not become effective, because they require the adoption of new application forms and those application



Hudson, Michigan, which fully conforms with all of the Commission's Rules and Regulations. In many respects, the situation here is analogous to the one involved in a Memorandum Opinion and Order released July 27, 1989, in the matter of Special Markets Media, Inc., (FCC 89-233). There, a number of applications for FM facilities had been returned because the applicants failed to comply with a "buffer zone" requirement, which had expired by the time the Commission reached the various petitions for reconsideration and issued a decision. While it did not specifically rely on the fact that the buffer zone had expired, the Commission nonetheless properly decided to reinstate the applications.

11. Here, the Commission put out a window notice and, as correctly indicated in the decision of the Chief, Audio Services Division, the Commission purported to cancel that window notice by another notice, issued only one business day prior to the closing of the window. Salov's consultants did not receive the cancellation notice until January 16, 1989, by which time his application was already prepared and ready for filing. Salov

respectfully submits that the cancellation notice was issued with

would not "work". As pointed out in Salov's original "Petition for Reconsideration and For Acceptance of Application", sites existed which could have been utilized without short-spacing, pursuant to a request for a waiver of the city coverage provisions of the rules. Sites also existed which would comply with the city coverage requirements of the rules, but would require a waiver of a minor short-spacing or short-spacings. Moreover, the Commission knew that it was in the process of adopting new rules which would allow applicants to apply for the Channel 249A assignment, without any waiver request by using a directional antenna. Thus, there was no reason why the assignment would not "work" and no reason why it should have been deleted.

13. Under the rules presently in effect, an application can be filed for Channel 249A at Hudson, Michigan in full conformity with all of the Commission's Rules and Regulations. Thus, there is no present reason to delete Channel 249A from Hudson, Michigan, and there was never any reason to delete the Channel. While the Commission will not ordinarily make a new allocation which requires the use of a short-spaced site, the Hudson allotment was an "old " allotment, which had been in existence for a long time. The Commission has enacted a rule, Section 73.213 of the Commission's Rules and Regulations, which purports to "grandfather" these old allotments and provide flexibility for stations operating under these old allotments to change their transmitter sites and operating facilities. Moreover, Section 73.215 of the Commission's Rules and Regulations, as

recently amended, enables the use of directional antennas, in cases where Section 73.213 does not offer adequate flexibility. The Channel 249A allotment at Hudson, like many other old allotments, may present "technical difficulties" resulting from other allotments which had been made. However, the allotment is no more unworkable than many others. Indeed, it is perfectly feasible to design an application for that allotment which complies with each and every requirement of the Commission's Rules and Regulations, as those Rules and Regulations are presently phrased.

14. Therefore, for the reasons set forth above, the allotment should not have been deleted; the window notice should not have been cancelled; and Salov's "Petition for Reconsideration and For Acceptance of Application" should have been granted.

WHEREFORE, it is respectfully requested that the Full Commission set aside and reverse the order of the Chief, Audio Services Division, Mass Media Bureau.

September 15, 1989

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Respectfully submitted,

JOHN M. SALOV

By



Lauren A. Colby
His Attorney

EXHIBIT A